RECORD AND BRIEFS

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No. 15-1248

IN THE
Supreme Court of the United States

MCLANE COMPANY, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* LAW PROFESSORS SUPPORTING PETITIONER

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BRIEF FOR *AMICI CURIAE* LAW PROFESSORS SUPPORTING PETITIONER

INTEREST OF *AMICI CURIAE*

Amici are law professors who teach and write about federal procedure and administrative law.[1] Both as academics and as teachers of future practitioners and judges, *amici* have an interest in ensuring that federal standards of review promote the sound administration of justice. They regard the allocation of adjudicative responsibilities to the different federal courts based on their institutional competencies to be of paramount importance. In

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Letters from counsel of record for each party consenting to the filing of this *amici* brief are on file with the clerk's office.

resolving this case, the Court's guidance will transcend the specific context of EEOC subpoenas. To that end, *amici* write to urge the Court to unify the circuits and give deference to district courts' determinations of relevance in administrative subpoena enforcement actions. *Amici* include:

- Lonny Hoffman, Professor of Law, University of Houston Law Center;
- Dru Stevenson, Professor of Law, South Texas College of Law Houston; and
- Darren Bush, Professor of Law, University of Houston Law Center

SUMMARY OF ARGUMENT

The Ninth Circuit erred by creating a division among the circuits regarding the appropriate standard of review for a district court's determination of relevance in the context of administrative subpoenas. The other courts of appeals have correctly recognized that, on the basis of institutional competency, whether to enforce such a subpoena is the kind of decision on which the appellate courts should defer to the district courts and should be overturned only if a district court abuses its discretion. This allocation of authority reflects the district courts' superior view of and experience with relevance determinations and preserves appellate courts' resources for articulating clear legal rules and ensuring that the law is both coherent and consistently applied.

ARGUMENT

I. Relative Institutional Competency Should Help Determine Standards Of Review

This Court has observed that the proper standard of review sometimes "has turned on a determination that, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question." *Miller* v. *Fenton*, 474 U.S. 104,

114 (1985). The district courts have long been recognized as better positioned to decide fact-intensive questions by virtue of their front-line vantage of the case, issues, and parties. See, *e.g.*, *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). But a district court is also better positioned to decide questions efficiently when those questions are not well suited for appellate courts' expertise in prescribing rules of decision, such as when the question is not readily reduced to specific, discrete principles or is subject to boundless potential contingencies that a simple rule could not well encompass. See *Pierce* v. *Underwood*, 487 U.S. 552, 561-562 (1988). In either scenario, deference to the district court furthers the sound administration of justice.

A. District courts are the most competent decision-makers when they have a superior view of the circumstances that generate a decision

Two principal factors distinguish and enhance the determinations of the district court. First, trial judges typically possess exclusive knowledge of the case. See *Pierce*, 487 U.S. at 560. "By reason of settlement conferences and other pretrial activities, the district court may have insights not conveyed by the record * * * ." *Ibid.* (discussing whether the government's position is substantially justified for purposes of fee-shifting statute). In addition, the district court's knowledge is shaped by the full sensory and intangible experience of the case. As evocatively described by the Supreme Court of Mississippi, the trial judge "smell[s] the smoke of battle." *Culbreath* v. *Johnson*, 427 So. 2d 705, 708 (Miss. 1983); see also Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 Syracuse L. Rev. 635, 664 (1971) (describing "the most pointed and helpful" reason for deferring to the trial court as resting "paradoxically, [on] the superiority of his nether position").

Relatedly, a district court also often has unique

knowledge arising out of its long history with a given case—the district court "lives with the case" for far longer and with greater intimacy than any other judge. See *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014). This familiarity with the case, parties, and issues enables the court "to marshal the pertinent facts and apply [a] fact-dependent legal standard." *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 402 (1990) (deferring to district court's Rule 11 determinations).

Second, even where the district court lacks any special knowledge, it may still have a superior view by virtue of its regular experience making similar decisions. "District courts have an institutional advantage over appellate courts in making [the decision to depart from sentencing guidelines], especially as they see so many more Guidelines cases than appellate courts do." *Koon* v. *United States*, 518 U.S. 81, 98 (1996) (overruled by statute, later reinstated as recognized in *Rita* v. *United States*, 551 U.S. 338, 361-362 (2007) (Stevens, J., concurring)); see also *Buford* v. *United States*, 532 U.S. 59, 64-65 (2001) (deferring to a district court's determination on the basis of the district court's experience with similar decisions). A court accustomed to making decisions based on the totality of the record will do so with greater ease than the appellate court. *Pierce*, 487 U.S. at 560 (considering the "unusual expense" borne by an appellate court unaccustomed to reviewing an entire record).

B. District courts are the most efficient decision-makers when the courts of appeals' rulemaking role is unnecessary or impractical

Appellate courts are better positioned to articulate rules of law and ensure coherent development of the law. Because appellate judges sit in panels, multiple judges simultaneously focus on difficult and important questions precisely because of the important precedential value of

the resulting answers. See, *e.g.*, *Mucha* v. *King*, 792 F.2d 602, 605-606 (7th Cir. 1986) (determining that an appellate court's "main responsibility is to maintain the uniformity and coherence of the law"). "It stands to reason that the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law." *United States* v. *McConney*, 728 F.2d 1195, 1201 (9th Cir. 1984) *(en banc)*.[2]

But not all decisions that lower courts make are readily "amenable to regulation by rule," and in such circumstances, there are "good reasons for conferring discretion on the trial judge * * * ." *Pierce*, 487 U.S. at 561-562 (internal quotation and punctuation omitted). Appellate court precedent provides only "minimal help" where the legal question at issue is case-specific, where the issue is multifarious and not easily resolved with reference to a rule, and where the consequences of the decision are insubstantial. *Buford*, 532 U.S. at 66; *Pierce*, 487 U.S. at 563.

This Court recognized as one such case-specific question the determination of whether—for purposes of a fee-shifting statute—the government's position in a specific case was substantially justified. *Pierce*, 487 U.S. at 562. The Court described the question as "precisely such a multifarious and novel question, little susceptible, for the time being at least, of useful generalization* * * ." *Ibid.*

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[2] Although courts regularly describe *McConney* as overruled by *Estate of Merchant* v. *C.I.R.*, 947 F.2d 1390 (9th Cir. 1991), *e.g.*, *Garvais* v. *United States*, 421 F. App'x 769, 770 (9th Cir. 2011) (recognizing overruling), *McConney* lives on as the ancestor of the Ninth Circuit's declaration that it reviews administrative subpoena enforcement determinations *de novo*. See Pet. App. 8 n.3 (citing *NLRB* v. *North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996), which cites *Reich* v. *Montana Sulphur & Chem. Co.*, 32 F.3d 440, 443 (9th Cir. 1994), which cites *EPA* v. *Alyeska Pipeline Serv. Co.*, 836 F.2d 443, 446 (9th Cir. 1988), which cites *McConney*).

(internal quotation omitted); see also *Highmark*, 134 S. Ct. at 1748-1749 (reaching the same conclusion regarding a different fee-shifting statute). The Court also noted that "[i]f this were the sort of decision that ordinarily has such substantial consequences, one might expect it to be reviewed more intensively." *Pierce*, 487 U.S. at 563.

Similarly, because "'[f]act-bound resolutions cannot be made uniform through appellate review,'" an appellate court's review of Rule 11 sanctions "is unlikely to establish clear guidelines for lower courts; nor will it clarify the underlying principles of law." *Cooter*, 496 U.S. at 405 (quoting *Mars Steel Corp.* v. *Continental Bank N.A.*, 880 F.2d 928, 936 (7th Cir. 1989)).

The determination that previous convictions were functionally consolidated for sentencing is "a minor, detailed, interstitial question," not "generally recurring" nor "readily resolved by reference to general legal principles and standards alone." *Buford*, 532 U.S. at 65. The case-specific, detailed factual circumstances critical to the determination "limit[] the value of appellate court precedent." *Id.* at 65-66.

Where an appellate court's specialization in rulemaking is not brought to bear to improve the decision of the district court, principles of judicial economy favor deference. "The judgment of three appellate judges is not necessarily better than the judgment of one district judge, but it is assuredly more costly to obtain and interpret." *Mars Steel Corp.*, 880 F.2d at 936. Considerations of cost, delay, and finality, as well as preferring not to overwhelm the appellate court's limited resources, all strengthen the decision to defer to the district court. See *Pierce*, 487 U.S. at 561 (considering the "investment of appellate energy" required by less deferential reviews); see also *Anderson* v. *City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (establishing the clearly-erroneous standard for review of factual findings because, in part,

the parties "have already been forced to concentrate their energies and resources on persuading the trial judge" and "requiring them to persuade three more judges at the appellate level is requiring too much").

This divide in relative competence generally mirrors the division between questions of fact and questions of law, but this generalization is incomplete. Many factual determinations have legal components that are nonetheless better resolved by the district court. As the Court put it in *Highmark*, "[a]lthough questions of law may in some cases be relevant to the [fee-shifting] inquiry, that inquiry generally is, at heart, 'rooted in factual determinations.'" 134 S. Ct. at 1749 (quoting *Cooter*, 496 U.S. at 401). Conversely, when district courts have no better view of the facts than appellate courts, the "factual" label does not necessarily justify deference. See *Thompson* v. *Keohane*, 516 U.S. 99, 114 (1995) (declining to defer to district court's determination of whether defendant was in custody for *Miranda* purposes, noting that unlike in voir dire or witness competency questions, "the trial court does not have a first-person vantage"); *Miller*, 474 U.S. at 117 (deferring to state trial court's resolution of underlying fact questions but not to its determination that a confession was voluntarily made, noting that "the state-court judge is not in an appreciably better position than the federal habeas court to make that determination"). Rather than attempt to characterize relevance determinations as ones of "fact" or "law" and allow the standard of review to flow mechanically from that determination, a holistic review of which institutional actor has the advantage in making the determination reveals the proper standard of review.

II. Relevance Determinations Are Best And Most Efficiently Made By The District Courts

Enforcement determinations for EEOC subpoenas require the district court to balance the relevance of the

information sought against "any contentions by the employer that the demand for information is too indefinite or has been made for an illegitimate purpose." *EEOC* v. *Shell Oil Co.*, 466 U.S. 54, 72 n.26 (1984). Though "relevant" is "not especially constraining," it is a constraint nonetheless. *Id.* at 68. *Some* judicial body must assess when the agency so strains the tether of relevance that it exceeds its authority. Because this decision can only be made with reference to the specific information requested and the nature of the underlying case, and because appellate rulemaking would be inefficient and largely without benefit, relevance determinations necessarily fall within the ambit of the district courts.

A. The district court has a unique and superior view of the relevance determination

District courts *routinely* make relevance determinations. Trial courts frequently consider the relevance of information requested in ordinary civil discovery under Federal Rule of Civil Procedure 26(b)(1) and admit only relevant evidence under Federal Rule of Evidence 401. Although what is "relevant" is more constrained in ordinary civil cases than for the purposes of EEOC's subpoena power, the decision nonetheless still involves balancing relevance and burden, and is also reviewed with deference to the trial court's discretion. *E.g.*, *Republic of Arg.* v. *NML Capital, Ltd.*, 134 S. Ct. 2250, 2254 (2014) (describing the general rule that *subject to the district court's discretion*, parties may obtain discovery of nonprivileged matters relevant to either party's claims or defenses); *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) (according broad discretion to district court's relevance determinations under Federal Rule of Evidence 401 in "deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters"). The district court brings its experience overseeing ordinary civil production

to assessing whether the demand for information is too broad or made with improper purpose.

This case illustrates when a district court may possess important data that only it can know. The district court was undoubtedly influenced by its experience with the same parties in an earlier case brought by the EEOC to enforce a subpoena issued under the ADEA. See Pet. App. 5. After a hearing, the District Court determined that the pedigree information sought was irrelevant to the EEOC's ADEA investigation, but otherwise enforced the subpoena. *EEOC* v. *McLane Co.*, No. CV-12-615-PHX-GMS, 2012 WL 1132758, at *5, 7 (D. Ariz. Apr. 4, 2012). Only then did the EEOC bring an enforcement action seeking the identical pedigree information in connection with the Ochoa investigation. The EEOC dismissed its appeal of the ADEA suit, leading the Ninth Circuit to consider the Title VII charge alone. Pet. App. 5 n.1. The Ninth Circuit did not consider whether the earlier subpoena indicated that the information sought was not genuinely relevant to the latter, as perhaps it might have if it had the intimate interactions with the parties in the ADEA case.

In addition to the earlier case, the district court also had the opportunity to question the attorneys at multiple hearings. Pet. Br. 16. The district court apparently relied on statements made at the hearing in determining that the primary purpose for which the EEOC sought the pedigree information was not relevant to the Ochoa investigation. Pet. App. 28.

The experience the district court had with the parties in this case, as well as with relevance determinations generally, provides ample assurance that its decision is infused with data that the appellate court could not replicate. This superior access to the crucial determinants of a ruling mean that the district court is best situated to efficiently decide the relevance question—unless the ap-

pellate court's rulemaking responsibility is particularly needed. As described below, no such need exists, and the Court's opinion would aid the clarity of the law by explaining why that is true and why it means that deference to district courts' rulings in comparable circumstances is justified.

B. Granular rulemaking by the courts of appeals is unnecessary in determining relevance

Some kinds of information may be categorically relevant to certain types of cases, but whether most information that is requested is relevant must be determined on a case-by-case basis. While the Ninth Circuit believed that social-security numbers were relevant to Ochoa's sex-discrimination charge, it does not follow that social-security numbers must be relevant to other sex-discrimination charges. The "rule" announced has little applicability outside the circumstances of this one case.

Not only is the benefit to future litigants slim, the receipt of the pedigree information also provides marginal help to Ochoa. It appears she is no more likely to obtain the relief sought if the EEOC succeeds or fails in obtaining the requested information—indeed, the information may have nothing to do with the underlying litigation issues *at all*.[3] See Pet. Br. 45-51. Even if interviews with individuals "might cast light" that a detailed statistical picture does not, the light cast is so wan that it fails to justify the tremendous appellate effort to capture it.

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[3] The district court echoed McLane's contention that the EEOC is "trolling for possible complainants." Pet. App. 29. The EEOC may also be seeking this information because it must meet a quota of litigation pursued on behalf of large groups of employees, which it calls "systemic cases." See U.S. EEOC, Fiscal Year 2017 Congressional Budget Justification 26 (2016) (describing a goal set in 2012 to maintain or increase the percentage of systemic cases litigated). Without the pedigree data, Ochoa's complaint remains that of a single employee and cannot help the agency meet its quota.

Whether the requested information is necessary is not the standard for relevance, of course, but the lack of "substantial consequences" flowing from the determination demonstrates that appellate review of this issue is not critical. See *Pierce*, 487 U.S. at 563.

Whatever slight benefit the Ninth Circuit's decision may provide to future cases or to Ochoa is outweighed by the heavy costs of appeal. Ochoa has waited eight years for resolution of her complaint—four of which are since the district court denied enforcement of the subpoena. Pet. App. 2, 5. And while the EEOC has a $67 million litigation budget, appeals are expensive for all parties. See U.S. EEOC, Fiscal Year 2017 Congressional Budget Justification 22 Tbl.4 (2016).

A system that facilitates a more rapid march to finality would benefit all involved. Ochoa of course would benefit from the resolution of her complaint—but so would the agency. The EEOC received nearly 90,000 new complaints in 2015 alone, a volume that necessitates only selective enforcement. See *id.* at 29. For the same reason, finality of district court decisions protects the public fisc. But finality also benefits the employers being investigated and the public interest. For eight years, McLane has had no resolution on whether its strength test is acceptable, forcing it (and others contemplating similar tests) to choose between protecting its employees by monitoring their ability to safely do their jobs and risking subsequent EEOC violations.

Finally, discretionary review eases the burden on the appellate court. The Ninth Circuit is already slower than its sister courts. See 2015 Ninth Circuit Annual Report 59 (reporting that the median time interval for cases terminated on the merits in the Ninth Circuit is 6.9 months longer than the national average). As the Ninth Circuit itself has said: "It can hardly be disputed that application of a non-deferential standard of review requires

a greater investment of appellate resources * * * . Appellate courts could do their work more quickly if they applied the clearly erroneous standard in most circumstances * * * ." *McConney*, 728 F.2d at 1201 n.7 (9th Cir. 1984).

III. The Standard Of Review For Relevance Determinations Will Spread Beyond EEOC Subpoena Enforcement Actions

Many executive branch agencies are authorized to subpoena information "relevant" to their respective domains. The question of which standard of review to use when assessing "relevance" spans across all administrative subpoena enforcement actions, not just actions brought by the EEOC. When this Court announces the standard of review for relevance determinations, it bears consideration that its judgment will affect these other administrative subpoenas. A non-deferential standard of review would spread the burdens identified in Part II (B), *supra*, beyond the limited number of enforcement actions brought by the EEOC and across the entire universe of administrative subpoenas.

A 2002 Department of Justice report on the use of administrative subpoenas cataloged 335 grants of subpoena power to executive agencies. *City of Los Angeles, Cal.*. v. *Patel*, 135 S. Ct. 2443, 2453-2454, (2015) (citing Office of Legal Policy, Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities 3, online at http://www.justice.gov/archive/olp/rpt_to_congress.htm). Many of these subpoena powers are limited to information "relevant" to a matter under the agency's purview. For example, the IRS may summon "'any books, papers, records, or other data which may be relevant or material' to a particular tax inquiry." *United States* v. *Arthur Young & Co.*, 465 U.S. 805, 813 (1984) (quoting 26 U.S.C. § 7602). FTC subpoenas, too, are confined to items relevant to an

authorized FTC inquiry. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U.S. 186, 208-209 (1946).

The scope of some of these agencies' investigative authorities may vary from that of the EEOC. See *Shell Oil*, 466 U.S. at 64 & n.14 (noting that, unlike the FTC's plenary investigative power, the EEOC can only investigate in connection with a filed complaint). Nonetheless, appellate courts regularly treat all administrative subpoenas—regardless of originating agency or authorizing statute—as guided by the principles laid out in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), an FTC subpoena enforcement action. *E.g.*, *United States* v. *Construction Prods. Research, Inc.*, 73 F.3d 464, 472 (2d Cir. 1996) (applying *Morton Salt* to evaluate enforcement action brought by Nuclear Regulatory Commission); *In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1415 (D.C. Cir. 1994) (applying *Morton Salt* in enforcement action brought by Office of Thrift Supervision); *Reich* v. *National Eng'g & Contracting Co.*, 13 F.3d 93, 99 (4th Cir. 1993) (noting that *Morton Salt* sets the standard for enforcing "an" administrative subpoena, in enforcement action brought by OSHA).

This homogenization of administrative subpoenas has led to some cross-pollination of "relevance" across various administrative subpoenas. For example, in *Shell Oil* this Court defined relevance as "virtually any material that might cast light on the allegations against the employer," 466 U.S. at 68-69. The opinion borrowed this language from the definition of relevance established in *Arthur Young & Co.*, an IRS subpoena enforcement case. *Shell Oil*, 466 U.S. at 69 & n.20 (citing 465 U.S. at 813); see also *id.* at 72 n.26 (asserting limits to EEOC subpoena power derived from IRS and FTC subpoena case law). This same *Arthur Young* relevance standard has been applied in subpoena enforcement actions brought by, among others, the FDIC, *In re McVane*, 44 F.3d 1127,

1135 (2d Cir. 1995), the Inspector General of the Department of Defense, *United States* v. *Westinghouse Elec. Corp.*, 788 F.2d 164, 170 (3d Cir. 1986), and the U.S. Attorney in connection with a health care fraud case, *United States* v. *Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 818 (8th Cir. 2012).

Unsurprisingly, given this cross-pollination, courts have also sought guidance on the appropriate standard of review across administrative subpoena case law broadly. *E.g.*, *Adamowicz* v. *United States*, 531 F.3d 151, 158 (2d Cir. 2008) (applying standard of review from an EEOC relevance determination to an IRS subpoena enforcement action). The perhaps thoughtless propagation of the clearly-erroneous standard from an FTC case to an FDIC case and then on to an EEOC case formed the subject of a concurrence by Judge Jon Newman in the Second Circuit. *EEOC* v. *United Parcel Serv., Inc.*, 587 F.3d 136, 140 (2009).

To the contrary of Judge Newman's criticism, a few courts have reasoned their way to a deferential standard of review. *E.g.*, *Ponsford* v. *United States*, 771 F.2d 1305, 1308 (9th Cir. 1985) (determining in an IRS enforcement action that while relevance determinations present "some legal and policy concerns," the nature of the inquiry is essentially factual and therefore reviewed under the clear-error standard); *Goodyear Tire & Rubber Co.* v. *NLRB*, 122 F.2d 450, 453 (6th Cir. 1941) (considering the text of the authorizing statute in leaving subpoena enforcement decision to the discretion of the district court). Through whatever origin, deference is the majority approach across all administrative subpoena enforcement actions.

Regardless of which standard of review this Court chooses, the web of case law connecting administrative subpoena decisions across agencies will likely ensure that the new standard is promulgated far beyond subpoenas

enforced by the EEOC. A *de novo* standard of review would increase the appellate burden and costs not just in the enforcement actions that the EEOC brings, but across subpoenas sought in 334 other contexts. A deferential standard not only avoids these burdens but preserves precedent in the majority of circumstances.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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